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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

"WILLIAM LOE"
Petitioner,

--against--

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
REDACTED

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QUESTIONS PRESENTED FOR REVIEW

1. What is the appropriate standard for determining whether a defendant who pleads guilty has been prejudiced by ineffective counsel.

2. What is the appropriate standard that a District Court must apply before upwardly departing from the Sentencing Guidelines, based on the Court's determination that defendant has engaged in prior criminal activity that is not captured in his criminal history category.

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The Opinion of the Court of Appeals for the Ninth Circuit was set forth in a unpublished memorandum filed on March 13, 2000, set forth at App. 1. The Petition for Rehearing was denied in an unpublished order set forth at App. 7.

JURISDICTION OF THIS COURT

The initial opinion of the Court of Appeals was filed on February 23, 2000. That opinion was withdrawn by Order filed March 10, 2000, and replaced by an unpublished sealed memorandum filed on March 13, 2000. A timely application for rehearing with a request that the memorandum opinion be filed under seal was filed in the Court of Appeals for the Ninth Circuit on March 6, 2000, and was denied by order of the Court of Appeals for the Ninth Circuit dated March 20, 2000. By Order of this Court dated 6, 2000, Petitioner's time to file this Petition was extended from June 19, 2000 until July 18, 2000. This Court has jurisdiction to review the judgment of the Court of Appeals by certiorari pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

U.S.S.G. §4A1.3 Adequacy of Criminal History Category (Policy Statement) provides, in pertinent part:

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

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(e) prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense, or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under § 4A1.3.

STATEMENT OF THE CASE

1. Introduction

The adoption of the Sentencing Guidelines in 1986 dramatically increased the complexity of the sentencing process. The imposition of this highly structured set of calculations on sentencing has created a scenario in which every decision made as to sentencing carries a labyrinth of implications demanding a specialized familiarity. The impact of their complexity has been particularly felt in situations where defendants, encouraged by the government to cooperate in exchange for sentencing benefits, attempt to sort out the processes and to negotiate plea bargains. Since each element of an offered plea arrangement may drive repercussions wholly unforeseeable to the inexperienced, the importance of counsel's role as an educator in evaluating pleas and making recommendations as to the potential outcomes has

assumed heightened significance.

In this case, the government extracted cooperation from an uncounseled defendant with verbal assurances that his cooperation would inure to his benefit. Following defendant's substantial cooperation, at great personal risk to himself and his family, upon his hiring private counsel, the government reneged on its promises and actually used the information provided by the defendant to file additional charges against him. Refusing to file a motion for a downward departure pursuant to U.S.S.G. § 5K1.1 and recommend that the defendant receive a benefit, the government instead urged the sentencing court to depart upwardly and punish the defendant more severely than the Guidelines would otherwise permit.

Defendant appealed the denial of his request that the government comply with its promise to file a Section 5K1.1 motion, and the court's upward departure from the Sentencing Guideline range. The Ninth Circuit Court of Appeals vacated the sentence because defendant had not received adequate notice, as required by Rule 32, of the legal grounds for the district court's upward departure. After vacatur and remand for resentencing, defendant moved to withdraw his guilty plea on the ground, among others, that his counsel had failed to adequately advise him of the sentencing consequences of his plea. That motion was denied, and the district court imposed a two level upward departure based on prior criminal conduct to give defendant the same sentence he had received prior to the remand – 40 years in prison. The Ninth Circuit upheld the denial of the motion to withdraw his guilty plea and the two category upward departure.

This Petition raises important questions that go to the heart of the plea bargaining process and standards relating to upward departures at sentencing: How strictly should the courts enforce the effectiveness of counsel standard in the context of advice relating to the evaluation of a plea offer and the consequences of accepting or not, and what standard must a district court before upwardly departing from the Sentencing

Guidelines on the basis of the court's determination that defendant has engaged in prior criminal activity that is not reflected in his criminal history category.

2. Facts

Petitioner "William Loe" ("Loe")[1] began to cooperate with the government almost from the moment he and his common-law wife were arrested in their home in 1995. At great risk to himself and his family, without the benefit of advice of counsel, and before even leaving his house, he agreed to contact a co-conspirator and arrange a meeting at which the co-conspirator would be arrested. Prior to agreeing to this request, Petitioner asked if he could speak to a lawyer, but was told he could not. Petitioner also immediately requested that his common-law wife benefit from his cooperation; specifically that she be released if he continued to cooperate.

Within hours, and while he was still uncounseled, Petitioner met with an Assistant United States Attorney who explained the terms of their agreement. From the very outset, the prosecutor assured Petitioner that, if he provided "substantial assistance," his assistance "would be brought to the attention of the judge at the time of sentencing." He also told Petitioner that the benefits of his cooperation could be "credited" to his wife.

Thereafter, and still without counsel, Petitioner led authorities to a location where they recovered 246 kilograms of cocaine and another co-conspirator was apprehended. He also made phone calls to his source in Colombia, in an effort to arrange for further cocaine deliveries which the government could monitor. Although not in writing, the prosecutor's promises to Petitioner – that he or his wife would receive a

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[1] Per this Court's direction, we are filing this submission 1) under seal, and 2) with redactions of Petitioner's real name, which has been substituted with the pseudonym "William Loe."

reduced sentence – were clear and understood by the Petitioner.

After his arrest and cooperation, Petitioner finally had the opportunity to meet with counsel appointed by the court. The prosecutor indicated that if he cooperated further, his sentence would be further mitigated. But, after Petitioner retained a private attorney, the government refused to work with him any further, specifically refusing to make a motion, pursuant to U.S.S.G. § 5K1.1, for a downward departure based on Petitioner's substantial assistance. Retained counsel made two written plea offers, each seeking a letter pursuant to §5K1.1. The government rejected both.

Not only did the government rebuff the plea offers, it filed a superceding indictment adding a count that charged Petitioner with engaging in a continuing criminal enterprise under 18 U.S.C. § 848(b)(2)(A)(the "CCE count"), the addition of which increased the minimum sentence that Petitioner faced from 20 years to life. Moreover, the government was able to allege the requisite quantity of drugs only by virtue of the 246 kilograms which had been seized as a result of information obtained through Petitioner's cooperation.

Facing a life sentence, Petitioner initially reached a plea agreement with the government which provided that Petitioner would plead guilty to two counts; that the other counts, including the CCE count, would be dismissed; and the government would recommend a sentence of 292 months. In exchange, Petitioner agreed to be "debriefed" by the government on certain specified issues. Though signed by Petitioner, this agreement was never put into effect.

At the plea allocution, after Petitioner had completed much of the allocution, the district court expressed concern over whether Petitioner and the government were in agreement over one aspect of the arrangement: the consequences in the event that the government determined that Petitioner had not fully satisfied his "debriefing" requirements. The prosecutor took the position

that if he felt that Petitioner had not given complete and truthful responses, the government could reinstate the CCE count and argue for a higher sentence on the counts to which he had pled. Defense counsel's understanding was that the government would then be free to argue for a higher sentence, but that it could not reinstate the CCE count.

The court instructed the parties to go back and work out their differences. No definite alternative plea agreement had been reached when the parties returned to the second allocution hearing four days later. Although the government made a definite offer at that time, as defense counsel notified the court, that agreement collapsed, not because Petitioner had provided untruthful information, but because the government, knowing that Petitioner desperately wanted to protect his wife, suddenly insisted that he implicate her, a condition the government knew full well Petitioner could not and would not accept.

Later, however, at the hearing on the motion to withdraw the plea, defense counsel testified that the main reason he advised Petitioner to reject the written plea agreement was because he felt that it was a trap; in his view, regardless of what Petitioner said about his assets, the government would contend he was lying and then renege on the agreement. Heeding counsel's advice, Petitioner rejected the written plea agreement.

Thus, instead of the detailed written plea agreement providing for a 292 month sentence, Petitioner entered into an oral plea agreement under which the government agreed to dismiss only the CCE count, with no agreement as to a sentencing recommendation, and Petitioner agreed to plead guilty to the remaining counts. As defense counsel testified, in the approximately ten minutes he had to confer with Petitioner, he advised Petitioner that, despite the absence of a sentencing recommendation, he was still likely to receive a 292 month sentence. Defense counsel also testified that he did not mention the possibility that the government might request an upward departure or that the court might impose one. He presented

Petitioner, who was required to make a virtually instant decision as to whether or not to accept the plea, with no alternative. In the end, Petitioner did accept the oral plea, and the court set the case down for sentencing.

In its sentencing submission, the government did not recommend that Petitioner receive a benefit for his immediate cooperation, but instead urged the court to upwardly depart and impose a sentence of life in prison. On the day of sentencing, after the district court had rejected the government's arguments for an upward departure, the government came up with a new ground for departure – Petitioner's alleged prior unpunished criminal activity. The court ultimately departed on that newly-announced basis, relying in large measure on the testimony of a co-defendant who was arrested as a result of Petitioner's cooperation. The court then imposed a sentence of 480 months.

Thus, in exchange for his cooperation, which led to the arrest of two co-conspirators and the recovery of 246 kilograms of cocaine, Petitioner received a sentence of 40 years; in essence, a life sentence. Having led the authorities to the very evidence that was then used to add to the charges against him, Petitioner was left worse off then he would have been had he not cooperated at all.

In getting Petitioner to that position, defense counsel rendered ineffective assistance, both in negotiating the plea and in advising Petitioner regarding his options. After the Ninth Circuit Court of Appeals vacated the original sentence and remanded for resentencing, Petitioner, represented by new counsel, filed a motion to withdraw his ill-advised plea.

At the hearing on that motion, former defense counsel testified that it had never even occurred to him that an upward departure might be imposed, and that he had told Petitioner that he would likely receive 292 months – the same sentence negotiated in the written plea agreement which, defense counsel testified, he advised Petitioner to reject, but over 15 years less

than the sentence Petitioner ultimately received. Defense counsel never advised Petitioner that there would be a sentencing hearing, or that at such a hearing, the government would be able to call witnesses whose arrest resulted from Petitioner's cooperation. Despite these candid acknowledgments by counsel, as well as a wealth of other evidence of ineffective assistance, the motion was denied.

Petitioner again sought credit for the cooperation he had provided by seeking a downward departure, and that motion was also denied.

The court then granted the government's motion for an upward departure, based on Petitioner's alleged prior criminal history not accounted for under the Guidelines.[2] The court upwardly departed two levels, to criminal history category IV, then imposed the same sentence it had given originally – 40 years in prison – a sentence which even the prosecutor had acknowledged was, for Petitioner, equivalent to a life sentence.

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[2]At the original sentencing, the court upwardly departed by two levels on the basis of prior unpunished criminal conduct and extraordinary drug quantity, grounds only advanced at the sentencing hearing. That sentence was vacated by the Ninth Circuit because the district court did not give adequate notice under Rule 32 of the legal grounds for its upward departure, and remanded for resentencing.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE APPROPRIATE STANDARD FOR A SHOWING OF PREJUDICE BY A DEFENDANT CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL IN THE CONTEXT OF A PLEA AGREEMENT

This case presents an important question concerning the appropriate standard for determining whether a defendant has shown prejudice in connection with a claim for ineffective assistance of counsel during the pre-trial plea process. The federal appellate courts have disagreed on what standard to apply, and the conflict should be resolved by this Court.

To demonstrate ineffective assistance of counsel, a defendant must show both that counsel's representation "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984).

In Hill v. Lockhart, 474 U.S.52 (1985), a pre-Sentencing Guidelines case, this Court extended the two-prong Strickland test to pre-trial plea proceedings, holding that it "applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U.S. at 58. The first half of the Strickland test, a "restatement of the standard of attorney competence already set forth" in Tollett v. Henderson, 411 U.S. 258 (1973) and McMann v. Richardson, 397 U.S. 759 (1970) went unchanged. When a defendant enters a plea of guilty pursuant to the advice of counsel, the plea is intelligent if counsel's advice was "within the range of competence demanded of attorneys in criminal cases." 474 U.S. at 59.

The second, "prejudice" prong of the test was altered by the Hill Court in its application to guilty pleas. Under Hill, to demonstrate prejudice as a result of counsel's inadequate representation at the plea stage, the defendant must show

> a reasonable possibility that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."

474 U.S. at 59.

The Ninth Circuit Court of Appeals denied Petitioner's claims under that standard, holding that "none of [Petitioner]'s arguments on appeal demonstrate that, but for trial counsel's alleged errors, [Petitioner] would have proceeded to trial." App. 4. That standard, while suggested by Hill, makes no sense in the context of a post-sentencing Guidelines plea entered into only after the defendant has cooperated but has failed to receive the promised Section 5K1.1 motion. As at least some courts have recognized, the courts must adapt the earlier jurisprudence to the realities of the Sentencing Guidelines regime and establish a standard that acknowledges the pivotal role that counsel plays in the federal sentencing process.

The lower courts are in disagreement over how to interpret the standard set forth in Hill. Different readings of Hill, with varying degrees of stringency, have been upheld by the Circuits and defendants challenging their representation at the plea bargaining stage are being held to a variety of conflicting standards.

The Third Circuit, for example, has interpreted Hill to require a defendant to show only a "different outcome." United States v. Kauffman, 109 F.3d 186, 191 (3rd Cir. 1997). Counsel's failure to investigate his client's history of mental illness and thus to uncover an available defense rendered his representation ineffective, and defendant's burden was to show "a reasonable

probability that the outcome of these proceedings would have been different" but for counsel's errors.

By contrast, the Fourth Circuit not only requires a showing that a "a reasonable defendant" would have proceeded to trial, see, e.g., Royal v. Taylor, 188 F.3d 239, 249 (4th Cir.), cert. denied, 120 S.Ct. 465 (1999); but also that defendant would have been acquitted. In Royal, the Court believed that, given the powerful evidence against defendant, even absent alleged attorney error, "it is likely that a jury would have convicted Royal and the judge would have given him the maximum sentence." Id. at 249. Burket v. Angelone similarly turned on defendant's inability to demonstrate that "a reasonable defendant" would have insisted on proceeding to trial. 208 F.3d 172, 190 (4th Cir.), cert. denied, ___ S.Ct. ___ (2000). Recognizing "the powerful evidence against [him], the circumstance of the crime, and the lack of available defenses," the Fourth Circuit again looked to the likelihood, given those circumstances, that "a jury would have convicted Burket and that the state trial court would have given him the maximum sentence." 208 F.3d at 190.

The Fifth Circuit, in Carter v. Collins, 918 F.2d 1198 (5th Cir. 1990), did not need to reach the issue of prejudice because counsel's representation was deemed sufficient, but the Court noted that since the "magistrate found ample evidence of guilt," she did not find defendant's assertion that he would have proceeded to trial but for the allegedly erroneous advice of counsel credible. 918 F.2d at 1203.

The practical ramification of the Fourth Circuit's strict interpretation, and the similar standard apparently read by the Fifth Circuit, is to render pre-trial counsel almost irrelevant. In any case where the government has substantial evidence of guilt, defendant's inability to show that he would have been acquitted will end the inquiry into his counsel's performance, effectively obviating the right to counsel for defendants who appear guilty.

A defendant in the Seventh Circuit must not only demonstrate that he would have insisted on going to trial; he must provide a specific explanation as to why he alleges that he would have done so. See, e.g., Santos v. Kolb, 880 F.2d 941, 943 (7th Cir. 1989), cert. denied, 493 U.S. 1059 (1990), citing Key v. United States, 806 F.2d 133 (7th Cir. 1986).

These cases, some of which might make sense in the context of their particular facts, often ignore the profound alterations the enactment of the Sentencing Guidelines have wrought on the criminal justice system.

Under the Guidelines, defense counsel can and does negotiate with the government on a range of Guidelines issues. For example, the amount of the loss in a fraud and larceny case usually drives the sentence and defense counsel and the prosecutor routinely negotiate over how loss will be calculated. Likewise, a defendant charged with mail fraud and money laundering can negotiate a sentence as between those two provisions of the Guidelines, which carry very different base offense levels. Effective counsel will be aware of the emerging caselaw on such issues as "grouping" and downward departures based on a "heartland" analysis of the money-laundering claim. The importance of informed counsel to negotiate and explain the implications of such issues cannot be treated lightly; yet as the caselaw has developed, a defendant who cannot show that proceeding to trial was a viable option is not entitled to such representation. The prejudice prong of Strickland has effectively driven out the substantive prong that evaluated counsel's performance.

In addition, because under the Guidelines, the most likely way to obtain a downward departure at sentencing is to cooperate with the prosecution, there is a powerful incentive to cooperate. Built into the Guidelines' structure is a reward system that operates to provide the most tangible benefit -- in the form of a 5K1.1 letter recommending a downward departure to the sentencing court -- to those defendants who begin to cooperate

with the police immediately upon arrest.

As a practical matter, once a defendant has begun to cooperate with police, "ratting out" co-defendants and providing leads to physical evidence of the crime, he has effectively foregone the option of proceeding to a trial. A defendant, like Petitioner – anxious to please the prosecutor who has sole discretion as to whether to bestow the reward of a Section 5K1.1 letter – may identify sources or direct the police to co-conspirators, and, who, like Petitioner, has quite possibly placed himself and his family in jeopardy, will never be able to make a credible showing that he would have opted to go forward with a public trial. Under the standard announced by the Ninth Circuit in this case, and the other Circuits that have read Hill strictly, such a defendant will never be able to demonstrate that he was prejudiced by counsel's advice, no matter how deplorable, as to the limited choice between taking a plea or going to trial.

But it is error to assume that the advice of counsel at this stage and on these issues is unimportant. A defendant who may not have a realistic option of proceeding to trial nonetheless has options beyond merely taking an offered plea. Significant issues are implicated by a decision to enter a plea agreement: considerations as to sentencing enhancements, sentencing ranges, departures, restitution and the like frequently arise, and, especially under the Guidelines, where disputes regarding the appropriate category that a crime should be charged under are common, advice from counsel about how to evaluate such options is essential. As even the direct consequences of a plea offer are frequently unforeseeable to the defendant, counsel's role in educating a defendant about the repercussions of these decisions is critical.

The instant case is a prime example of how the standards have failed. Petitioner, who instantly began cooperating with police, did not just have the option of a trial or a plea; he also had the option of accepting the written plea agreement or proceeding with an open plea. Since defense counsel did not

appear to understand the potentially devastating consequences to defendant of going forward with the oral plea, he terribly misadvised defendant to reject the written plea offer.

The written plea agreement would have set an agreed-upon 292 month sentence, but Petitioner, on the basis of counsel's erroneous advice, instead made an open plea and received a sentence nearly twice as long as he was likely to receive under the written agreement. Counsel did not warn Petitioner that he could face an upward departure on the criminal history grid, that he could get a life sentence, or that there would be a sentencing hearing at which the government could call witnesses; nor did he provide Petitioner with the tools necessary to evaluate whether he was better off accepting the written agreement, despite the risks, than having no agreement at all. As a result, despite having provided substantial assistance to the government, due to counsel's erroneous and incomplete advice, Petitioner was deprived of any benefit from his cooperation, and indeed wound up worse off than if he had not cooperated at all.

Had counsel properly advised Petitioner of the exposure he faced by proceeding without the benefit of the written agreement, Petitioner would certainly have exercised different options. Yet, under the standard adopted by the Ninth Circuit, he cannot make a showing of prejudice, because, having already provided the prosecutors with substantial information, he cannot reasonably claim that he would have gone to trial.

As set forth above, the lower courts run the gamut on the standard for determining prejudice on ineffective assistance claims set in this context, and the decisions are difficult to reconcile. This Court could and should step in and set the appropriate standard, with the understanding that both cooperation and negotiation over sentencing issues have become significant factors in sentencing under the Guidelines. The body of caselaw that has arisen to interpret Hill almost exclusively tests circumstances where defendants either took an offered plea or went to trial. Yet under the Sentencing Guidelines, these are

no longer the only options.

The standards employed by the Ninth Circuit and those Circuits that have required even more -- a showing that the defendant would have been acquitted if he went to trial -- are far too narrow. The practical effect of most Circuit's tests (with the exception of the Third Circuit's more expansive reading) is to deny the validity of the alternative options that are raised, in fact heavily encouraged, by the Sentencing Guidelines. Defendants who, for any number of reasons, rejected the option of going to trial, are essentially foreclosed from challenging the effectiveness of the counsel they received.

In a system where roughly eighty-five percent of criminal cases are ultimately disposed of through guilty pleas,[3] the priority of shaping a consistent standard for effective assistance of counsel during the pre-trial plea process deserves the attention of this Court.

II. CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT QUESTION OF WHAT STANDARD A DISTRICT COURT MUST APPLY BEFORE UPWARDLY DEPARTING FROM THE SENTENCING GUIDELINES, BASED ON THE COURT'S DETERMINATION THAT DEFENDANT HAS ENGAGED IN PRIOR CRIMINAL ACTIVITY THAT IS NOT CAPTURED BY HIS CRIMINAL HISTORY.

Sentencing Guideline Section 4A1.3 permits a sentencing court to depart upwardly where:

> [R]eliable information indicates that the criminal history category

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[3]Sourcebook of Criminal Justice Statistics Online - 1999, table5.23 (http://www.albany.edu/sourcebook/1995/pdf/t523.pdf)

> does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes.

U.S.S.G. §4A1.3.

Categories representing the different types of "reliable information" that a sentencing court may consider in deciding whether to upwardly depart are set out in the section's subparts, and include: prior sentences not used in computing the criminal history category, prior similar misconduct established by a civil adjudication; and whether defendant was pending trial or sentencing on another charge at the time of the present offense. A departure is warranted, according to the Guideline, "when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes."[4]

However, it is §4A1.3(e), the residual exception, permitting upward departures for "prior similar adult criminal conduct not resulting in a criminal conviction," that requires this

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[4] The provision identifies a number of examples of proper departures: a defendant who (1) had several previous foreign sentences for serious offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense, or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense.

None of these examples applied in this case.

Court's attention. While the purpose of the residual clause is to allow consideration for "prior criminal conduct" which, for one reason or another is not adequately accounted for in the criminal history category, since the Guideline does not define the broad scope of includable "prior criminal conduct," this subpart can be, and has been, read broadly as a catchall to support a wide range of departures. Subject to no inherent standard governing the propriety of departures, and with no uniform standard in place to govern a court's obligations to articulate a basis for either the imposition of a criminal history departure under subpart (e), or for justifying its degree, this catchall provision presently allows sentencing judges virtually unbridled discretion in imposing upward departures on the basis of prior conduct, a circumstance completely antithetical to the spirit of the Guidelines.

In this case, the district court added two levels to Petitioner's criminal history axis because it believed that Petitioner had been "heavily involved in major importation and distribution of cocaine in the United States," which conduct, he felt, "should have led to [at] least two prior convictions." (emphasis added) Petitioner had no prior convictions, or even arrests, had not been processed through the criminal justice system for any of his alleged misdeeds, and the court pointed to no specific acts or concrete evidence of Petitioner's purported criminal past to justify the departure or its degree. Instead, the judge's two level upward departure was apparently based on his personal belief that Petitioner had a criminal past. Having made that departure, the court plucked a two level increase out of thin air. It did not articulate a reason for a two-level, as opposed to a lesser or greater level, departure.

To discourage the abuse of this sentencing loophole, this Court should address the very important question of whether a district court may impose an upward departure using U.S.S.G. §4A1.3(e), where the defendant has never been charged with any prior crimes and the departure is based on the sentencing judge's personal view of the defendant's propensity for criminal activity.

The Guidelines's directive that "the court use, as a reference, the Guideline range for a defendant with a higher or lower criminal history category, as applicable," U.S.S.G. §4A1.3, suggests that the extent of the departure must be based on the extent and nature of the prior conduct and tied to the way such conduct would have been treated had it resulted in a criminal conviction.

Here, however, the court did not explain how Petitioner's prior conduct made him more like a defendant with two additional convictions. It simply determined that Petitioner had been involved in drug trafficking in the past – stating, among other things, its general view that "you don't start off receiving from Columbian cartel four hundred kilos of cocaine without a track record"[5] – and then chose "two" as the number of additional prior convictions it would attribute to Petitioner.[6]

This is not, and cannot be, a proper method for establishing the extent of a criminal history departure; it contains no limiting principle. If this procedure were allowed, then, whenever a judge faced a defendant who he "believed" was a "criminal", but who may never have been convicted of a crime, the judge would be free to ignore the Guidelines and impose whatever higher sentence he personally felt was appropriate.

The law in the Circuits is in need of guidance on the proper approach to apply this section. Some Circuits have required the district court to explain the "methodological basis" it used in determining the degree of departure. See United States v. Bartsma, 198 F.3d 1191 (10th Cir. 1999). Other Courts, like

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[5] Indeed, the court's awareness of the volume of cocaine that was involved was gained only through information obtained via Petitioner's cooperation.

[6] The court imposed the departure without specifying the dates or amounts of sales, parties to the transactions, or the like.

the Ninth Circuit in this case, allow the sentencing court to depart without any substantive analysis of either the grounds for its departure, or for its selection of the degree. See, e.g. United States v. Herr, 202 F.3d 1014, 1015 (8th Cir. 2000); United States v. Barber, 200 F.3d 908, 923 (6th Cir. 2000)

An additional problem posed by U.S.S.G. §4A1.3 is the lack of any uniform standard for providing notice to a defendant of what "prior criminal conduct" may form the basis for the court's upward departure. The government's calculation of a defendant's criminal history category is set forth in the Pre-Sentence Report, by which the government gives notice to the defendant of the prior acts that may determine his criminal history category. This permits defendant an opportunity to contest, on the merits, the inclusion of any given act.

By contrast, in the context of an upward departure under the residual exception of U.S.S.G. §4A1.3, a defendant can face an enhancement of his sentence for activity that is ill-defined and without precise contour, even if he is notified of the government's intention to seek an upward departure or of the court's intention to consider one. The defendant cannot adequately address the merits of his prior criminal history since there is no specific conduct at issue. This is particularly dangerous for defendants with no criminal history who accept a plea agreement, who cannot fathom that a court might upwardly depart on the basis of the judge's personal view that he is, essentially, a career criminal.

The present unrestrained use of U.S.S.G. §4A1.3(e) seriously undercuts the Sentencing Guidelines. Specifically promulgated to replace the previous discretion-oriented jurisprudence with a grid-based system designed to generate more equal and consistent sentences, the Guidelines are now in danger of being overtaken by the discretionary loophole this exception presents.

This Court should take the opportunity to provide guidance to the lower courts as to the appropriate standards for the exception's application, or, as in the pre-Guideline era, courts may freely utilize the residual clause to craft sentences they personally deem appropriate. Liberal, unrestricted use of the residual clause, without a standard requirement for an explanation or methodological basis underlying the upward departure, has and will continue to enable courts to avoid the circumscriptions of the Guidelines.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully,

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